80-791

Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

in the

Supreme Court
of the
United States

CASE NO.___

NOVEMBER TERM, 1980

CHARLES EDWARD BLEWS,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, FLORIDA

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Attorney for Petitioner

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QUESTION PRESENTED FOR REVIEW

WHETHER THE FIRST AND FOURTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRE REVERSAL OF A CONVICTION FOR DISTRIBUTION OF THREE OBSCENE EIGHT-MILLIMETER FILMS WHERE, WITHOUT A WARRANT, THE POLICE SEIZED AND, OVER A PERIOD OF EIGHT DAYS, REVIEWED A TOTAL OF 345 FILMS WITHOUT SEEKING A JUDICIAL DETERMINATION OF OBSCENITY OR PROBABLE CAUSE.

THE PETITIONER, CHARLES EDWARD BLEWS, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the District Court of Appeal, Fourth District, Florida, entered in this proceeding on January 30, 1980.

JURISDICTION

The judgment of the District Court of Appeal, Fourth District, Florida, was entered on January 30, 1980. A timely petition for re-hearing was denied on March 5, 1980.

On October 9, 1980, the Petitioner filed with this Court, an application for extension of time in which to file petition for writ of certiorari.

On October 13, 1980, Mr. Justice Powell signed an order extending the time in which to file a petition for a writ of certiorari to and including November 17, 1980.

The jurisdiction of this Court to review the case on petition for certiorari rests upon 28 U.S.C. Section 1257(3).

This case involves the First, Fourth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Petitioner was convicted in the Circuit Court, Broward County, Florida, before the Hon. Humes T. Lasher, Judge, of wholesale promotion of obscene material, and sentenced to five years' imprisonment. He is presently at liberty on a supersedeas bond. Petitioner appealed his conviction to the District Court of Appeal, Fourth District, Florida.

The District Court of Appeal affirmed in *Blews v. State,* 379 So. 2d 677 (Fla. 4 DCA 1980). (Opinion enclosed as *EXHIBIT A).*

The Petitioner filed a timely petition for re-hearing with the District Court of Appeal. Re-hearing was denied on March 5, 1980.

On March 19, 1980, Petitioner moved for a stay of the mandate pending certiorari review before the Florida Supreme Court. On April 9, 1980 the District Court of Appeal of Florida, Fourth District, granted Petitioner's motion to stay the mandate pending certiorari review in the Florida Supreme Court.

On August 19, 1980, the Supreme Court of Florida denied certiorari review, holding that the Court was without jurisdiction. (Opinion enclosed as *EXHIBIT B).*

The federal constitutional issues addressed in this petition were first raised in the trial court by way of a motion to suppress the evidence. *(EXHIBIT C).* This motion was denied by the trial court on June 28, 1977 *(EXHIBIT D).* The issue was briefed and argued at the

appellate level in the Appellant's Brief, Points V, VI and VII. The District Court of Appeal, Fourth District, affirmed without opinion in *Blews v. State,* 379 So. 2d 677 (Fla. 4 DCA 1980). Judge Beranek dissented with the following opinion addressed to the issue which is presently before the Court:

> I respectfully dissent. This was a prosecution under Section 847.07(4)(c), Florida Statutes (1975), for the wholesale promotion of obscene materials. Since the materials in question were seized without a warrant, I believe a prompt judicial determination of probable cause should have occurred. I would reverse the conviction. 379 So. 2d at 677.

STATEMENT OF FACTS

On October 12, 1976 at 5:40 p.m., Officer Michael Camarro of the North Lauderdale, Florida police department, pulled his police car into a service station parking lot (T. Vol. 3, p. 6-7; Vol. 5, p. 33)[1]. The officer observed three people who were standing beside two automobiles in a shopping center parking lot across the street. (T. Vol. 3, pps. 7, 9; Vol. 5, pps. 35, 90). There were many other vehicles and people in the shopping center parking lot, (T. Vol. 3, p. 31; Vol. 5, p. 38), as the stores were open for business. (T. Vol. 5, p. 93). Officer Camarro was several hundred feet away from the three people. (T. Vol. 3, p. 31; Vol. 5, p. 37). Officer Camarro knew that one of the three people, Mr. Wisotsky, was in the film business (T. Vol. 5, p. 40).

The trunks of both vehicles were open, and Wisotsky and the other two people being observed by Officer Camarro were exchanging boxes (T. Vol. 3, pps. 8, 32; Vol. 5, pps. 36, 37, 96, 136). Officer Camarro did not actually know what was in the boxes, and admitted that it could have been anything, including lawbooks (T. Vol. 3, p. 33). At this point the sole reason Officer Camarro believed the crime of "delivery of obscenity" was being committed was his "knowledge" of Wisotsky. (T. Vol. 5, p. 101).

Officer Camarro then decided to call for a back-up officer and find a pretext for an arrest (T. Vol. 5, p. 128; T. Vol. 3, pps. 10, 43; Vol. 5, pps. 41, 128).

---

[1]The symbol "T" refers to the trial transcript, which is a part of the record on appeal before the District Court of Appeal, Fourth District, Florida.

Officer Camarro requested the backup officer to detain the vehicle as a routine traffic stop. (T. Vol. 5, p. 42; Vol. 5, p. 102). Little did they know that the car driven by Petitioner Blews would make a U-turn, thus offering them a perfectly plausible pretext for a stop. (T. Vol. 3, pps. 33, 45). Nevertheless, Officer Camarro testified honestly at trial, stating that he made his decision to stop the Blews car based on the mere suspicion that Wisotsky was known to be in the film business (T. Vol. 5, p. 40). The backup officer, Block, stopped Blews' car.

Officer Block, Petitioner Blews, and the passenger were standing together when Officer Camarro arrived. While Officer Block was verifying Blews' identity and proper ownership of the automobile, (T. Vol. 5, p. 131), Officer Camarro walked around Blews' car. (T. Vol. 3, p. 13; Vol. 5, p. 46). Officer Camarro saw, on the rear deck (the car was a hatchback), six large cardboard boxes (T. Vol. 3, p. 14).

One box bore the name "Seacoast", and was addressed to Ft. Pierce, Florida, from Georgia (T. Vol. 3, p. 14).

Only one of the six large boxes was open, and it contained matter not fully visible to Camarro, with the exception of two smaller boxes (T. Vol. 3, p. 15). Only a picture on the front of these two boxes was visible to Camarro (T. Vol. 3, p. 17). He saw the words "Vivid Eroticolour", and believed these words to constitute probable cause to believe that the boxes contained obscene .8 mm film (T. Vol. 3, p. 38; Vol. 5, p. 58). Since he could see the shapes of six or more boxes with sides

similar to these two boxes, without any visiable words or pictures, Camarro believed Blews was in possesion of six articles of the same obscene material, and Blews was, therefore, committing the crime of wholesale distribution of obscenity (T. Vol. 3, p. 39).

Based upon this, Officer Camarro arrested Blews (T. Vol. 5, pps. 49, 58).

Officer Camarro then seized all of the boxes, explaining at trial:

> I observed obscene materials in a motor vehicle without an out-of-state plate, within a short period of time, about to leave my jurisdiction. There would not have been any time for the application for a search warrant to search this vehicle.
> (T. Vol. 3, p. 27).

A judge was holding court in the municipality at the time (T. Vol. 3, p. 34).

Officer Camarro then took the cartons containing 345 films back to the North Lauderdale police station, where he locked them in a bathroom adjoining the office of the Chief of Police (T. Vol. 5, p. 71). Over a period of eight (8) days, Officer Camarro inventoried the total 345 films (T. Vol. 5, p. 50), including the three seen at trial (T. Vol. 5, p. 122).

Pursuant to defense counsel's questioning, the officer stated at trial that the films found in the cartons did appeal to prurient interest, went beyond customary

candor in describing sexual activity, and were without redeeming social, entertainment, literary, artistic, or political value (T. Vol. 5, pps. 109-113).

Officer Camarro testified that no one assisted him in inventorying the films and, to the best of his knowledge, no one other than himself ever viewed the contents of those cartons until the day of the trial (T. Vol. 5, p. 76). Officer Camarro testified that he arrested Blews on a Tuesday, and he began to inventory the films on the following Monday. (T. Vol. 5, p. 117). The cartons of films were locked in the office of the Chief of Police for one week before Officer Camarro began his inventory. The inventory itself consumed eight (8) days of Officer Camarro's time "working between eight and ten hours each day, non-stop." (T. Vol. 5, p. 50). Despite the fact that the films were safely locked up in the office of the Chief of Police, where they could not be disturbed or destroyed by the Petitioner Blews, Officer Camarro nevertheless did not seek a search warrant before he examined the films, nor at any time did he seek a judicial determination of obscenity. The films remained in the bathroom adjacent to the Chief of Police's office from the date of arrest until the trial, some eight months later (T. Vol. 5, p. 71).

ARGUMENT

This was a prosecution for wholesale promotion of obscene material. The materials in question were seized without a warrant. The subsequent viewings by Officer Camarro over a period of eight days was unwarranted and unprotected by any exception to the Fourth Amendment exclusionary rule. The search and seizure issue presented in this case is a hybrid; a combination of the Fourth Amendment warrant requirement and the First Amendment requirement of judicial review for seizure of suspected obscene materials.

Officer Camarro observed three people standing beside two cars in a shopping center parking lot across the street. Officer Camarro knew one of the three people was in the film business. On the basis of this knowledge, Officer Camarro ordered a backup officer, to stop the car driven by the Petitioner. As Officer Camarro approached the Petitioner's car, he saw two boxes with the words "Vivid Eroticolour". Assuming that the stop was based on a founded suspicion, and even assuming that the officer had probable cause to believe that the boxes contained obscene films, he should not have reviewed the films without a warrant and without a prompt judicial determination of obscenity.

The major teaching of the Supreme Court's decisions in the obscenity area is that some form of judicial procedure designed to focus searchingly on the question of obscenity must precede governmental interference with material arguably within the protection of the First Amendment. (Citations omitted). *United States v. Sanders,* 592 F.2d 788, 979 (5th Cir. 1979).

As is made evident by *Roaden v. Kentucky*, 413 U.S. 496, 93 S.Ct. 2796 (1973), greater caution than might otherwise be necessary is required in seizure of obscene materials because of the interplay of the First and Fourth Amendments. In *Roaden*, the Sheriff, after watching a film at a drive-in movie, went to the projection booth and arrested the manager for exhibiting an obscene film. Incident to that arrest, he made a warrantless seizure of one copy of the film. In concluding that the seizure was reasonable, this Court contrasted the seizure of a commercial film from the seizure of contraband which is changing hands, or where a robbery or assault is being perpetrated. In the latter setting, the probable cause for an arrest might justify the seizure of weapons or contraband, but where First Amendment rights are concerned, the seizure can only be in a now-or-never situation. Officer Camarro was faced with a now-or-never situation.

> I observed obscene materials in a motor vehicle with an out-of-state plate, within a short period of time about to leave my jurisdiction. There would not have been any time for the application for a search warrant to search this vehicle.
> (T. Vol. 3, P. 27).

Unlike the Sheriff in *Roaden*, Officer Camarro could not hope to obtain a search warrant and then come back and seize the films. If the words "Vivid Eroticolour" on the outside of two boxes gave Officer Camarro probable cause to seize the films, no one can fault him for doing so. Exigent circumstances were clearly present at the time of the seizure. But of course,

the inquiry does not stop there. Officer Camarro took the films back to the police station where he locked them in the bathroom behind the Chief of Police's office. One week later, he began to review and inventory the films. Working eight to ten hours a day, he finally segregated the three obscene films[2]. The issue is drawn. The seizure may have been legal, but the search was not. The seizure took place under exigent circumstances covered by the automobile exceptions to the exclusionary rule. Subsequent to the seizure of the six cartons, Officer Camarro conducted an eight-day search by way of reviewing each of the 345 films to determine which, if any, were obscene. Seldom, if ever, is a case so indistinguishable from the prior decisions of this Court as to warrant a summary reversal citing only the Court's prior decision. This is such a case.

In *Walter v. United States,* ____ U.S. ____, 100 S. Ct. 2395, 2402 (1980), the Court was faced with a situation in which FBI agents viewed films seized by a private party without first making any effort to obtain a warrant or a judicial determination of obscenity. Discussing the government's right to make an independent search which exceeded the scope of a private search, the Court said:

> Prior to the government's screening one could only draw inferences about what was on the films. The projection of the films was a

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[2]Since Officer Camarro was the only person to review the contents of the seized cartons, it must be assumed that the remaining 342 films, as well as the carton containing 150 pocketbooks (T. Vol. 5, p. 78) were legally innocuous, or at the very least, not obscene.

> significant expansion of the search that had been conducted previously by a private party, and therefore must be characterized as a separate search. That separate search was not supported by any exigency, or by a warrant, even though one could have easily been obtained.
> 100 S.Ct. at 2402.

When Officer Camarro brought the 345 films seized from the Petitioner to the office of the Chief of Police and locked them in the bathroom, his position, *vis-a-vis* the films, was analogous to that of the FBI agents in *Walter v. United States.* That is to say, the films, while perhaps having been legally seized, were not stripped of any First and Fourth Amendment privacy interest[3].

Although exigent circumstances may have dictated the seizure of the films, it does not necessarily follow that the legality of this seizure negated the warrant requirement in any subsequent search. Once Officer Camarro had seized the cartons containing the films, there was no excuse to conduct a subsequent search without a warrant.

In *United States v. Chadwick,* ____ U.S. ____, 97 S. Ct. 2476, 2484 (1977), this Court said:

Nor does the footlocker's mobility justify

---

[3]"The fact that the labels on the boxes established probable cause to believe the films were obscene clearly cannot excuse the failure to obtain a warrant; for if probable cause dispensed with the necessity of a warrant, one would never be needed . . ." 100 S.Ct. at 2402, n. 10.

> dispensing with the added protection of the warrant clause. Once the federal agents had seized it at the railroad station and had safely transferred it to the Boston Federal Building under their exclusive control, there was not the slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained. The initial seizure and detention of the footlocker, the validity of which respondents do not contest, were sufficient to guard against any risk that evidence might be lost. With the footlocker safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant.
>
> The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression. *Marcus v. Search Warrants of Property,* 367 U.S. 717, 729, 81 S. Ct. 1708, 1715 (1961).

In *Marcus,* this Court held that a State procedure for issuance of warrants for seizure of obscene material did not provide for the proper safeguards to insure due process of law where police officers were allowed to make seizures without notice or any hearing afforded to the movants prior to seizure for the purpose of determining whether or not the publications were obscene.

In the present case, the only determination of obscenity which was made prior to trial, was made by Officer Camarro, when for a period of eight days,

working eight to ten hours per day, he reviewed each of the 345 films seized from the Petitioner Blews.

> It is no reflection on the good faith or judgment of the officers to conclude that the task they were assigned was simply an impossible one to perform with any realistic expectation that the obscene might be accurately separated from the constitutionally protected. They were provided with no guide to the exercise of informed discretion, because there was no step in the procedure before seizure designed to focus searchingly on the question of obscenity.
> 367 U.S. at 731, 81 S. Ct. at 1716.

The law is well settled that warrantless searches and seizures are *per se* "unreasonable", under the Fourth Amendment to the United States Constitution, subject only to a few specifically established and well-delineated exceptions.

> The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of government.
> *United States v. U.S. District Court,* 407 U.S. 297, 319, 92 S. Ct. 2125, 2137 (1972).

In unsurping the function of the judiciary, Officer Camarro has violated the constitutional rights of the

Petitioner Blews. The First and Fourth Amendments to the United States Constitution as applicable to the States through the Fourteenth Amendment require that the Petitioner's conviction be reversed.

It is submitted that the proper procedure in the present case would have been for the police to seize the materials and hold them pending procurement of a search warrant and a judicial determination of obscenity. See *G. I. Distributors v. Murphy*, 490 F. 2d 1167 (2nd Cir. 1973), where the obscene publications were unexpectedly discovered in the execution of a search warrant in a warehouse, and the Court upheld the police action in remaining on the premises and guarding the materials until a search warrant naming them could be obtained.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the District Court of Appeal, Fourth District, Florida.

Respectfully submitted,

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By FRANK C. FURCI
FRANK C. FURCI,
Counsel for Petitioner

and

ROY E. BLACK,
Attorney of Record for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of November, 1980, three copies of the petition for writ of certiorari were mailed to: RUSSELL H. BOHN, ESQ., Assistant Attorney General 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401.

ROY E. BLACK, P.A.
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By FRANK C. FURCI

FRANK C. FURCI,
Counsel for Petitioner

Appendix

Charles Edward BLEWS,

Appellant,

v.

STATE of Florida,

Appellee,

No. 79-263.

District Court of Appeal of Florida,
Fourth District.

Jan. 30, 1980.

Rehearing Denied March 5, 1980.

Appeal from Circuit Court, Broward County; Humes T. Lasher, Judge.

Roy E. Black of Black & Denaro, P.A., Miami, for appellant.

Jim Smith, Atty. Gen., Tallahassee, Mary E. Marsden and Russell S. Bohn, Asst. Attys. Gen., West Palm Beach, for appellee.

PER CURIAM.

We have carefully reviewed the record and the numerous points raised by appellant. Finding, as we do, that none of the points have merit, we affirm.

AFFIRMED.

HERSEY and GLICKSTEIN, J.J., concur.

BERANEK, J., dissents with opinion.

EXHIBIT "A"

BERANEK, Judge, dissenting:

I respectfully dissent. This was a prosecution under Section 847.07(4)(c), Florida Statutes (1975), for the wholesale promotion of obscene materials. Since the materials in question were seized without a warrant, I believe a prompt judicial determination of probable cause should have occurred. I would reverse the conviction.

AUG 22 1980

SUPREME COURT OF FLORIDA

TUESDAY, AUGUST 19, 1980

CHARLES E. BLEWS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 59,037

District Court of Appeal,
4th District — No. 79-263

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla. R. App. P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur
ADKINS, Acting C.J., dissents

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

TO
cc: Hon. Clyde Heath, Clerk
Hon. Humes T. Lasher, Judge
Hon. Robert E. Lockwood, Clerk

Frank C. Furci, Esquire
Russell S. Bohn, Esquire

EXHIBIT "B"

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 76-4989 CF "J" Lasher

STATE OF FLORIDA,

Plaintiff,

vs.

CHARLES EDWARD BLEWS,

Defendant.

AMENDED MOTION TO SUPPRESS

COMES NOW the Defendant, by and through his undersigned counsel, and pursuant to Rule 3.190, Florida Rules of Criminal Procedure, and the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution, makes this Motion to Suppress as evidence all items seized by the police and all statements made by the Defendant, including but not limited to all films, magazines and/or pocket books seized from Defendant, and as grounds therefor, says:

1. There was no probable cause to justify the initial stop of the vehicle which the Defendant was driving.

2. There was no probable cause to justify the search of the Defendant's vehicle and the mass seizure resulting therefrom.

3. The Defendant did not consent to the search and seizure and said search and seizure was not conducted pursuant to the issuance of a search warrant.

4. That the material seized from Defendant's vehicle was presumptively protected by the First Amendment and was not contraband per se, and, pursuant to a long line of U.S. Supreme Court and Florida Appellate Court decisions, could not be seized without prior judicial scrutinization and authorization. *Marcus v. Search Warrant,* 367 U.S. 717 (1961); *A Quantity of Books v. Kansas,* 378 U.S. 205 (1964); *Lee Art Theatre v. Virginia,* 392 U.S. 636 (1968); *Heller v. New York,* 13 CrL. 3240 (1973); *Roaden v. Kentucky,* 13 CrL. 3243 (1973), U.S. Supreme Court; *Rhodes v. State,* 283 So.2d 351, 354 (Fla. 1973); *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963).

5. That any statements made by Defendant BLEWS should be suppressed since they were the fruits of an illegal stop, arrest, search and seizure.

EXHIBIT "C"

6. For the purpose of this Motion and hearing on said Motion, Defendant incorporates the depositions of Officer Michael Camaro and Officer Andrea Bloch.

7. That Defendant would rely upon the following statement of facts in support of his Motion to Suppress. On October 12, 1976, Officer Michael Camaro of the North Lauderdale, Police Department observed a vehicle being driven by the Defendant, CHARLES EDWARD BLEWS, and instructed another Officer,

Andrea Bloch, to stop said vehicle for purposes of ascertaining the identity of the driver and the passenger. Officer Bloch did, in fact, stop said vehicle being driven by the Defendant, ostensibly for making an illegal U-Turn, and after the occupants of the vehicle stepped outside and talked with Officer Bloch near her police car, Officer Camaro approached the Defendant's car and immediately commenced a visual search by looking through the windows of the vehicle.

Officer Camaro observed six (6) cartons in the rear of Defendant's automobile, five (5) of which were completely closed without revealing any of their contents. One (1) carton was open at the top and Officer Camaro could see what purported to be two (2) film boxes, along with other items which could not be completely identified at that time.

Based upon this observation, Officer Camaro then placed the Defendant under arrest, even though he was not exactly certain as to the nature of the offense (see Officer Camaro's deposition, Page 19) and Officer Camaro proceeded to enter Defendant's vehicle, search it in its entirety and seize all of the cartons and their contents.

According to information received by Defendant in response to Discovery, the seizure by Officer Camaro represented in excess of seven hundred (700) items, including film boxes, films, magazines and paperback books. At no time were any of these items taken before a judicial magistrate, and the Officer did not have a search warrant prior to the seizure of the items as aforesaid.

WHEREFORE, Defendant respectfully moves this Court to suppress all items and materials seized from Defendant or his automobile at the time of his arrest.

I HEREBY CERTIFY that a true copy of the foregoing Amended Motion to Suppress was mailed to the office of the State Attorney, Broward County Courthouse, 201 S.E. 6th St., Fort Lauderdale, FL 33301, this 3 day of May, 1977.

BRUCE L. RANDALL
Attorney for Defendant
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Landmark Bank Building
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491-1510

IN THE CIRCUIT COURT IN AND
FOR BROWARD COUNTY, FLORIDA

NO. 77-3088 LASHER

THE STATE OF FLORIDA

vs.

CHARLES E. BLEWS

Defendant.

ORDER

This cause coming on this day to be heard upon Motion of the Defendant TO SUPPRESS PHYSICAL EVIDENCE AND MOTION TO CONTINUE, and the Court having heard argument of counsel both for the State and the Defendant, and being fully advised in the premises, it is

HEREBY ORDERED AND ADJUDGED that the DEFENDANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE IS HEREBY DENIED AND THE DEFENDANT'S MOTION TO CONTINUE IS DENIED.

DONE AND ORDERED in open Court, in Fort Lauderdale, Broward County, Florida, this 28th day of June, 1977.

HUMES T. LASHER
Judge, Circuit Court
in and for Broward County,
Florida

Copies to:
Bruce Randall
State Attorney

EXHIBIT "D"

CASE NO. 80-794

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CHARLES EDWARD BLEWS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEALS, FOURTH DISTRICT, STATE OF FLORIDA

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case presented by Petitioner. Respondent also accepts Petitioner's Statement of the Facts to the extent that they are an accurate and non-argumentative recitation of proceedings in the trial court. However, Respondent reserves the right to present its own statement of the facts if this Court grants the writ and requires briefs on the merits.

ARGUMENT

Petitioner does not challenge the validity of the seizure of the films in this case, conceding the existence of probable cause and exigent circumstances therefor. His complaint is that after the seizure, the police did not procure a search warrant and a judicial determination of obscenity before viewing the films. As the issue is thus framed, Respondent maintains that Petitioner has failed to pose a substantial federal question which has not been decided in harmony with this Court's prior decisions.

In Heller v. New York, 413 U.S. 483 (1973), this Court considered the question of whether a judicial officer can issue a constitutionally valid warrant for a film's seizure without

first conducting an adversary hearing on the issue of probable obscenity. This Court held that an adversary hearing prior to seizure was unnecessary given the safeguards provided by New York's procedure, and the rationale of that decision is instructive for purposes of the instant case. Specifically, this Court pointed out that the film in Heller was not subjected to any form of "final restraint," in the sense of being enjoined from exhibition or threatened with destruction where a copy of the film was temporarily detained in order to preserve it as evidence. Id. at 490. In the instant case, the films were neither being exhibited nor were they seized for the purpose of their destruction, but rather their preservation as evidence.

Further, in Heller this Court stated the following:

> Petitioner made no pre-trial motions seeking return of the film or challenging its seizure, nor did he request expedited judicial consideration of the obscenity issue, so it is entirely possible that a prompt judicial determination of the obscenity issue in an adversary proceeding could have been obtained if Petitioner had desired. Although we have refrained from establishing rigid, specific deadlines in proceedings involving seizure of allegedly obscene material, we have definitely excluded from any consideration of "promptness" those delays caused by the choice of the defendant.
>
> * * * *
>
> ...If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and, following the seizure, a prompt judicial determination of the obscenity issue in an

> adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible.

Id. at 490-492 (footnotes omitted).

In the instant case, the seizure was not pursuant to a warrant, but it was nonetheless valid because, as Petitioner concedes, Officer Camarro was faced with one of the "now or never" situations alluded to by this Court in Roaden v. Kentucky, 413 U.S. 496, 505 (1973). Moreover, as in Heller, following the seizure, a prompt judicial determination of the obscenity issue was available at the request of Petitioner pursuant to §933.14, Fla. Stat.(1975)[Exhibit A], but he did not avail himself of it. The availability of this procedure was addressed by the Florida Supreme Court in the case of Rhodes v. State, 283 So. 2d 351(Fla.1973). In Rhodes, two films being

exhibited by the defendant were seized pursuant to a warrant issued without a prior adversary judicial hearing. The defendant's motion to suppress was denied, and the films were shown during trial, resulting in the defendant's conviction under the then-applicable Florida obscenity statute. On appeal, the defendant contended that there was not a prompt judicial determination of the obscenity issue, and after having cited §933.14, supra, earlier in its opinion, the Florida Supreme Court stated the following:

> Finally, the contention that there was not a proper and expeditious determination of the alleged obscenity is refuted by the fact of the immediate availability of a hearing on the obscenity question before the court which was at all times open for such a hearing. Appellant simply did not avail himself of it....

Id. at 358.

While §933.14 initially speaks in the context of a search warrant, it also addresses a situation where officers have taken property in the context of a probable cause search without a warrant or incident to a legal arrest, and it is clear that the provisions of the statute are available where a seizure is effected without a warrant. Cf. 1955 Op.Att'y Gen. Fla. 055-300 (November 9, 1955). Like the defendant in Rhodes, while Petitioner did file a motion to suppress, he never filed a motion for the return of the film or for a prompt judicial determination of obscenity pursuant to §933.14. As he points out in his Statement of Facts, he was arrested on a Tuesday, and the inventory of the films did not begin until the following

Monday. Even more time elapsed between the date of his arrest and the date of trial. Unlike the petitioner in Walter v. United States, ___U.S.___, 100 S.Ct. 2395 (1980), Petitioner herein had knowledge of the seizure from the first moment. Thus, he should not now be heard to complain that there was no prompt judicial determination of obscenity when such a determination was available to him upon request; nor does he here present a substantial federal question because the decision of the Fourth District Court of Appeal of Florida is consonant with this Court's decision in Heller v. New York, supra.

CONCLUSION

Based on the foregoing argument, Respondent respectfully requests that the instant Petition for Writ of Certiorari to the District Court of Appeal, Fourth District, State of Florida, be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____day of_____, 1981, three copies of the Response to Petition for Writ of Certiorari were mailed to Roy E. Black, P.A., Attorney for Petitioner, at Suite 1402, 150 S.E. 2nd Avenue, Miami, Florida 33131.

_____
ROBERT L. BOGEN

APPENDIX

§933.14 RETURN OF PROPERTY TAKEN UNDER SEARCH WARRANT

(1) If it appears to the magistrate or judge before whom the warrant is returned that the property or papers taken are not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds upon which the warrant was issued, or if it appears to the magistrate before whom any property is returned that the property was secured by an "unreasonable" search, the judge or magistrate may order a return of the property taken; provided, however, that in no instance shall contraband such as slot machines, gambling tables, lottery tickets, tally sheets, rundown sheets or other gambling devices, paraphernalia and equipment, or narcotic drugs, obscene prints and literature be returned to anyone claiming an interest therein, it being the specific intent of the legislature that no one has any property rights subject to be protected by any constitutional provision in such contraband; provided, further, that the claimant of said contraband may upon sworn petition and proof submitted by him in the circuit court of the county where seized, show that said contraband articles so seized were held, used or possessed in a lawful manner, for a lawful purpose, and in a lawful place, the burden of proof in all cases being upon the claimant. The sworn affidavit or complaint upon which the search warrant

was issued or the testimony of the officers showing probable cause to search without a warrant or incident to a legal arrest, and the finding of such slot machines, gambling tables, lottery tickets, tally sheets, rundown sheets, scratch sheets, or other gambling devices, paraphernalia and equipment, including money used in gambling or in furtherance of gambling, or narcotic drugs, obscene prints and literature, or any of them, shall constitute prima facie evidence of the illegal possession of such contraband and the burden shall be upon the claimant for the return thereof, to show that such contraband was lawfully acquired, possessed, held and used.

EXHIBIT A